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JUL 3 1985
ALEXANDER L. STEVAS,
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NO. 85-101

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GUILLERMO ARAIZA, JR., PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO._____

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GUILLERMO ARAIZA, JR., PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT:

QUESTION PRESENTED FOR REVIEW

Whether the Court can circumvent the intent of Rule 609(c) not to let any evidence of a prior conviction be admitted by allowing the Government to cross examine witness about facts surrounding the prior conviction pursuant to Rule 404(b).

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OFFICIAL REPORT

The Court below has determined that the opinion should not be published. No. 84-1888, May 8, 1985. (see appendix)

JURISDICTIONAL STATEMENT

Jurisdiction is founded on Title 28 United States Code Section 1254(1).

The question presented is an important questions of federal evidence law in that there is a conflict between interpretation of two rules of evidence.

STATUTORY PROVISION

FEDERAL RULES OF EVIDENCE, RULE 404(b)

Rule 404(b). Other crimes, wrongs or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however,

be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FEDERAL RULES OF EVIDENCE, RULE 609(c)

Rule 609(c). Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that per-

son has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

STATEMENT OF THE CASE

In April of 1984 a Drug Enforcement Agent was introducted to the Co-Defendant. Co-Defendant offered to produce a sample of heroin, which he did. Surveillance of the area where the transfer took place revealed that the Co-Defendant drove off with Defendant. Defendant was indicted in a two count indictment alleging in Count One a conspiracy in violation of 21 U.S.C. Sec. 846 and Count Two of aiding and abetting in violation of 21 U.S.C. Sec. 841(a)(1). At the trial the Co-Defendant, who had made a "plea bargaining" agreement testified in behalf of the Government. Defendant desired to testify in his own behalf and presented a Motion In Limine asking the Court to preclude the Government from going into evidence of his prior conviction because he had a Certificate of Rehabilitation as provided

by Fed. R. of Evid., Rule 609(c). The Court denied the in limine motion ruling that although evidence of the conviction could not be used to impeach Defendant, evidence of the underlying facts constituting the offense would be admissible under Fed. R. Evid. 404(b). Defendant then elected not to testify and was convicted on Count One of the indictment and found not guilty on Count Two.

ARGUMENT

This case presents a different posture from the facts in the Luce Case. Luce v. United States, 469 U.S. 83 L.Ed. 2d, 443, 105 S.Ct. . In Luce only one evidentiary rule was presented and ruled on. In this case the Trial Court rules the evidence not admissible under Rule 609(c) but admissible under Rule 404(b). This Court needs to resolve the conflicting ruling and resolve it in favor of the Petitioner. This Court has previously held that the possibility of receiving greater punishment on retrial of a successful appeal has a "chilling effect" on a Defendant's right to appeal. North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed. 2d, 656, 89 S.Ct. 2072. In United States v. Jackson, 390 U.S. 570, 20 L.Ed 2d, 138, 88 S.Ct. 1209, the Court noted at P. 147:

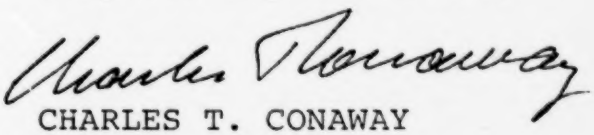
> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic contitutional rights."

Surely the right to testify in ones own defense secure in the knowledge that Rule 609(c) will preclude the Government from delving into his past conviction is a basic constitutional right that should not be needlessly chilled. In New Jersy v. Portash, 440 U.S. 450, 59 L.Ed. 2d, 501, 99 S.Ct. 1292, this Court was faced with a similar situation as we have here. In Portash the Defendant was granted immunity to testify before the Grand Jury. On the subsequent trial the Trial Court held that the prosecution could use the Grand Jury testimony for the purpose of impeachment. The Defendant declined to testify and was convicted. This Court affirmed the ruling of the New Jersy Court in reversing and remanding the case for new trial and precluding the prosecution from using the immunized Grand Jury testimony. In the concurring opinion of Justice Brennan in Luce, supra, he states:

"In that case (Portash, supra), the others in which the determinative question turns on legal and not factual considerations, a requirement that the Defendant actually testify at trial to preserve the admissible issue for appeal might not necessarily be appropriate."

Petitioner contends that like Portash, supra, Rule 609(c) precluded the Government's inquiry into his prior conviction and the ruling of the Court allowing the Government to go into the conviction if Petitioner took the stand effectively denied him his constitutional guarantees against compulsory self-incrimination. Amendment Five United States Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Petition for Writ of Certiorari has been served upon The Solicitor General, Department of Justice, Washington, D.C., 20530 by depositing the same in the United States Post Office mailbox, with postage prepaid, on this the 2nd day of July, 1985.

Charles T. Conaway

CHARLES T. CONAWAY

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1888
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GUILLERMO ARAIZA, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Convicted by a jury of conspiracy to distribute heroin, 21 U.S.C. §§ 841(a)(1) and 846, Guillermo Arazia appeals, contending that the court erred in an evidentiary ruling and that the evidence was insufficient to support the jury's verdict. Finding no error, we affirm.

Facts

The factual scenario involves the defendant, along with Ramon Gonzales and Juan Villareal who became acquainted at a halfway house for former convicts, and Nicholas Zapata, an undercover DEA agent. At Zapata's suggestion, Villareal asked Gonzales if he could supply heroin for a customer. When Gonzales expressed an interest the three met and discussed doing business. Zapata informed Gonzales that he wished to buy a large quantity of heroin if a sample purchase proved satisfactory.

A few days later Araiza gave Gonzales a heroin sample and drove him to a motel where Gonzales met Villareal and Zapata and partially concluded the sample purchase transaction. Gonzales told Zapata and Villareal that he would deliver

one-half of the heroin and, upon payment of the $1,400 purchase price, would secure and deliver the remaining half. Zapata agreed, paid the $1,400 and received one-half of the agreed quantity of heroin. Shortly thereafter Araiza returned to the motel and gave Gonzales the balance of the heroin which Gonzales promptly delivered to Zapata. Gonzales paid Araiza $1,000. DEA agents maintained a surveillance of the meetings and saw Gonzales depart the motel parking lot with Araiza after the transaction was concluded.

Thereafter, Zapata and Gonzales agreed to other heroin deals but none came to fruition. Araiza was observed with Gonzales when the latter placed telephone calls to discuss the proposed heroin transactions. Ultimately Gonzales was arrested, at which time he had on his

person an address book containing a telephone number for a "Willie." Gonzales told DEA agents that Willie supplied the drug sample. Willie turned out to be Araiza.

Araiza was indicted for conspiracy to distribute heroin and for aiding and abetting in its distribution. He filed a motion in limine to prevent the prosecutor from introducing evidence of a 1978 drug conviction for possession of 125 pounds of marihuana. Upon successful completion of the terms of his probation Araiza was granted a certificate of rehabilitation. The court denied the in limine motion, ruling that although evidence of the conviction could not be used to impeach Araiza, evidence of the underlying acts constituting the offense would be admissible under Fed.R.Evid.

404(b) in cross-examination of Araiza, if he testified and denied the acts, to show "intent and knowledge . . . absence of mistake [and] possibly even motive and opportunity." The court also ruled that such evidence passed muster under Rule 403 in that its probative value was not substantially outweighed by the danger of unfair prejudice.

Araiza opted not to testify. He was convicted of conspiracy and acquitted of aiding and abetting.

Analysis

A. Evidentiary Ruling.

Araiza maintains that his conviction must be reversed because of the trial court's ruling that evidence of his prior offense would be admissible under Rule 404(b) if he testified. Araiza suggests that because of this ruling he did not testify thus violating his sixth amendment right to effective assistance of counsel and his fifth amendment right to decline "to give evidence against himself that was not otherwise available to the government." A recent decision by the Supreme Court provides the dispositive rule for this assignment of error. In Luce v. United States, _____ U.S. _____, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), the Court held that to preserve a claim of error concerning a ruling involving

impeachment evidence, a defendant must testify. We perceive the Luce ruling applicable to errors urged under Rule 609 as well as Rule 404(b) in the present setting. The Court's teaching is unequivocal: "[T]o raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." 83 L.Ed.2d at 448. The Court reasoned that to allow otherwise would place the reviewing court in the position of speculating as to the nature of testimony. In addition, the Court found that when a defendant does not testify, "[a]ny possible harm flowing from a district court's in limine ruling permitting impeachment by prior conviction is wholly speculative." 83 L.Ed.2d at 447. Further, "[w]hen a defendant does not testify, the reviewing court also has

no way of knowing whether the Government would have sought to impeach with the prior conviction . . . Because an accused's decision whether to testify 'seldom turns on the resolution of one factor,' New Jersey v. Potash, 440 U.S. 450, 467 (1979) (Blackmun, J., dissenting), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify." 83 L.Ed.2d at 448.

Araiza did not preserve this claim of error. We therefore do not address whether the district court erred in its evidentiary ruling regarding the extrinsic offense evidence.

B. Sufficiency of the Evidence.

Araiza complains that there was insufficient evidence of an illegal

agreement and that the court improperly admitted hearsay evidence before compliance with the James rubric. He also complains that there was a variance between the dates alleged in the indictment and the actual proof relative to the commencement of the conspiracy. These arguments were not advanced in the trial court and may be considered on appeal only if they constitute plain error. Fed.R.Crim.P. 52(b); United States v. Todd, 735 F.2d 146 (5th Cir. cert. denied, 105 S.Ct. 957 (1985).

Araiza does not dispute that the government made the showing required by our decision in United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). He objects to the sequencing. We are not persuaded. Although it would have been preferable for

the district court to have made a formal James ruling prior to allowing any hearsay by a coconspirator, see United States v. Nichols, 695 F.2d 86, 90 n.1 (5th Cir. 1982), there was no reversible error because Araiza's involvement was inadequately proven separate and apart from these statements. United States v. Whitely, 670 F.2d 617 (5th Cir. 1982). In addition, Gonzales' testimony about his and Araiza's statements were admissible under Rule 801(d)(2)(E).

The argument as to a fatal variance is equally unpersuasive. The indictment charged that the conspiracy began on or about January 1, 1984 and continued until May 18, 1984. Evidence focused on April 1984. An allegation concerning the exact time of the offense is not an essential element of the offense charged. United

States v. Cochran, 697 F.2d 600 (5th Cir. 1983); Russell v. United States, 429 F.2d 237 (5th Cir. 1970). "With variance, our concern is whether the indictment . . . has so informed a defendant that he can prepare his defense without surprise and has protected him against a second prosecution for the same offenses." Cochran, 697 F.2d at 604. Where claims of variance are raised regarding the time of the offense and where time is not an essential element of the offense, we inquire into "reasonable limits of the on or about allegation." Id.

The times involved in the present case are within those limits. Cochran (50-day differential within reasonable limits of the on-or-about allegation); United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (four-month differential

allowed). Araiza does not claim, nor can he, that the variance impaired the preparation of his defense, nor does he claim that it subjects him to a second prosecution for the same offense. He has demonstrated no prejudice resulting from the variance.

Finally, there was ample evidence of Araiza's involvement in the conspiracy, some of which is reflected above, and there was no error in the trial court's exclusion of certain hearsay from the defendant's wife. The jury's verdict is supported by the evidence and the conviction is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1888
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GUILLERMO ARAIZA, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, POLITZ, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

May 8, 1985

ISSUED AS MANDATE: May 30, 1985

THE COURT: Mr. Conaway, before we proceed with the jury, I wanted to recite on the record the Court's ruling in chambers concerning your question about whether or not the 1970 -- was it six or eight offense?

MR. SPECK: '78.

THE COURT: -- 1978 conviction on possession of 125 pounds of marijuana where your client got probation and was certified rehabilitated, whether or not the Court would allow any testimony concerning that matter. As Mr. Speck pointed out, 609(c) disallows it. You pounted out 609(c) disallows it. It would not be allowed under 609(c).

Now, as to whether or not any information, either on cross-examination or if he denies it, any other information that might relate to that particular

possession would be admissible. The Court previously, in the Fifth Circuit, was governed by the case of U.S. v. Myers, 550 Fed. 2d 1036, a 1977 case in the Fifth Circuit, which gave a five-pronged test that the Court must follow in order to decide whether to bring it in.

Of course, Beacham in 1978, U.S. v. Beacham, 582 Fed. 2d 898, overruled U.S. v. Broadway which was 477 Fed. 2d 991. And there, of course, the determination that must be made is whether or not the extrinsic evidence is relevant to an issue other than defendant's character. Here, the Court can make that finding without any further assistance of evidence.

I think that it would, in fact, fall under 404(b) squarely under intent and knowledge, indentity -- pardon me -- knowledge, absence of mistake, possibly

even under motive and opportunity, and I think it's -- as to the relevance of it, it is relevant.

If -- the second step is whether it possesses probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403, and the Court will make the finding that it does, in fact, possess probative value that is not substantially outweighed, that is, the detrimental value -- or the detriment to him does not outweigh sufficiently to keep it out, and the Court will allow it.

All right, sir. Do you require other findings either for the Government or the defendant?

MR. CONAWAY: No. We simply announce to the Court that the Court's ruling has caused the defendant to elect

not to testify in his own behalf, and thereby has depirved him of effective assistance of Counsel, an essential witness in his own behalf, to-wit, himself, and we feel that the probative value, if any, to indicate any knowledge or intent, scheme, system, design or otherwise is far outweighed by the prejudicial value which would fall against the defendant in light of the fact that his testimony would, if shown before the jury, show that he was nothing more than a mere taxi driver for the State's star witness, Mr. Ramon Gonzales.

THE COURT: Aside from legal standard which the Court knows must be met, the common sense nature of what we're dealing with in terms of his knowledge and his intent would tend to support the Court's judgment to allow the information

and not deprive the jury of true information concerning the nature of his enterprise.

Now, is there any other matter to be considered before we bring in the jury?